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February 19, 2014

Via Lawyer's Service
Hon. Francis B. Schultz, J.S.C.
Superior Court of New Jersey
Law Division-Hudson County
Brennan Courthouse, 4th Floor
583 Newark Avenue
Jersey City, New Jersey 07306

Re: Lynne Mitchnick vs. William Lee Childs
Docket No. HUD-L-4742-12

Dear Judge Sarkisian:

My firm represents the plaintiff, Lynne Mitchnick (hereinafter "Plaintiff") in the above-entitled action. Please accept this letter brief in lieu of a more formal brief in opposition to the motion filed by the defendant, William Lee Childs (hereinafter "Defendant") seeking reconsideration of this Court's December 4, 2013 Order pursuant to R. 4:49-2. As will be set forth below in greater detail, the Defendant's motion should be denied in its entirety because the Defendant has failed to articulate a single cognizable instance where this Court either "expressed its decision based upon a palpably incorrect or irrational basis", or "did not consider, or failed to appreciate the significance of probative, competent evidence" as required by New Jersey law to prevail upon a motion for reconsideration pursuant to R. 4:49-2. Cummings v. Bahr, 295 N.J.

Super. 374, 384, 685 A.2d 60, 65 (App. Div. 1996), citing D'Atria v. D'Atria, 242 N.J.Super. 392, 401, 576 A.2d 957 (Ch.Div.1990). Accordingly, Defendant's motion should be denied in its entirety.

Statement of Facts

On or about October 4, 2013 Plaintiff filed a motion for summary judgment as to liability on the Plaintiff's claim for breach of contract alleged in the First Count of the complaint, as well as summary judgment as to the affirmative defenses of waiver and illegality raised by the Defendant in the answer, pursuant to R. 4:46. Defendant filed a cross-motion for summary judgment seeking the dismissal of the Plaintiff's complaint on or about November 7, 2013. The Court heard oral argument on both motions on November 22, 2013, and issued an order and memorandum opinion dated December 4, 2013 wherein the Court granted Plaintiff's motion for summary judgment as to the affirmative defense of illegality, denied the balance of the Plaintiff's motion, and denied the Defendant's cross-motion in its entirety (hereinafter the "December 4, 2013 Order"). The Court provided copies of the December 4, 2013 Order to counsel for all parties under cover of a letter dated December 4, 2013, and Defendant filed the present motion for reconsideration on or about January 24, 2014.

Statement of Law and Argument

POINT I

The Defendant's motion should be denied in its entirety because the Defendant has failed to identify any cognizable error by the motion Court in entering the December 4, 2013 Order

The Defendant seeks reconsideration of the Court's December 4, 2013 Order pursuant to R. 4:49-2, which states:

> Except as otherwise provided by *R.* 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served

> not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.
>
> R. 4:49-2

It is well-settled under the law of the State of New Jersey that motions for reconsideration are to be decided "within the sound discretion" of the trial court. Dover-Chester Associates v. Randolph Twp., 419 N.J. Super. 184, 195-96, 16 A.3d 467, 473-74 (App. Div. 2011), citing Hinton v. Meyers, 416 N.J.Super. 141, 148 (App.Div.2010); Fusco v. Bd. of Educ. of Newark, 349 N.J.Super. 455, 462, 793 A.2d 856 (App.Div.), *certif. denied*, 174 N.J. 544, 810 A.2d 64 (2002). Similarly, it is well-settled that the reconsideration mechanism set forth in R. 4:49-2 is a limited remedy which requires a movant to meet a substantial burden in order to prevail:

> Reconsideration should be utilized only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence....
>
> Cummings v. Bahr, 295 N.J. Super. 374, 384, 685 A.2d 60, 65 (App. Div. 1996), citing D'Atria v. D'Atria, 242 N.J.Super. 392, 401, 576 A.2d 957 (Ch.Div.1990).

In order to prevail on a motion for reconsideration pursuant to R. 4:49-2, the movant must show that the subject order or judgment was entered arbitrarily or capriciously:

> a litigant must initially demonstrate that the Court acted in an arbitrary, capricious, or unreasonable manner, before the Court should engage in the actual reconsideration process. The arbitrary or capricious standard calls for a less searching inquiry than other formulas relating to the scope of review. Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a Court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement. The arbitrary, capricious or unreasonable standard is the least demanding form of judicial review.
>
> D'Atria v. D'Atria, 242 N.J. Super. at 401, 576 A.2d at 961.

In addition, the movant must also show that the alleged error by the Court must be is extremely significant and material: "the magnitude of the error cited must be a game-changer for reconsideration to be appropriate." Palombi v. Palombi, 414 N.J. Super. 274, 289, 997 A.2d 1139, 1147 (App. Div. 2010), citing D'Atria v. D'Atria, 242 N.J. Super. at 401, 576 A.2d at 961.

Reconsideration is "not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion." Palombi v. Palombi, 414 N.J. Super. 274, 288, 997 A.2d 1139, 1147 (App. Div. 2010). As the Appellate Division has previously stated:

> [T]he purpose of *R.* 4:49-2 is not to re-argue the motion that has already been heard for the purpose of taking the proverbial second bite of the apple. Rather, its purpose is to allow the losing party to make "a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred."
>
> State v. Fitzsimmons, 286 N.J. Super. 141, 147, 668 A.2d 453, 456 (App. Div. 1995) certification granted, cause remanded on other grounds, 143 N.J. 482, 672 A.2d 1165 (1996).

1. The Court did not err in deciding the plain language of the agreement excluded online poker play.

In the case at bar, the Defendant's motion should be denied in its entirety because the Defendant has failed to identify a single alleged error by this Court that could serve as cognizable grounds for reconsideration pursuant to R. 4:49-2. The first alleged error identified by the Defendant is that this Court erred in finding that the plain language of the written agreement between the parties, which states in relevant part "Online tournaments are excluded from this initial agreement but open to discussion later", meant that online poker tournaments were not governed by the written agreement between parties. For the Court's convenience, a true copy of the signed agreement between the parties is annexed hereto.

It is undisputed that the parties never actually executed any subsequent agreement governing funding for online poker play. It is similarly undisputed that the written agreement

between the parties explicitly required any subsequent modifications be formalized in writing when it stated "Backer and Player may modify this agreement at any time, provided that both consent to the revisions in writing." Despite this clear and unambiguous language, the Defendant now argues that because the parties had discussed a separate agreement governing funding for online poker play, and because the Plaintiff had prepared a draft of said agreement, the parties had an intent to enter into another agreement relating to funding for online poker play, and that this unexpressed intent is somehow sufficient to modify the terms of the written agreement between parties. This argument fails for two reasons.

First, this argument is wholly inconsistent with New Jersey law, as demonstrated by the fact that the Defendant failed to cite any case law cited in support of this argument. It is black-letter law in the State of New Jersey that "when the terms of a contract are clear and unambiguous, there is no room for construction and the court must enforce those terms as written." Watson v. City of E. Orange, 175 N.J. 442, 447, 815 A.2d 956, 959 (2003), and that "parties are bound by the contracts they make for themselves", Barr v. Barr, 418 N.J. Super. 18, 32, 11 A.3d 875, 882 (App. Div. 2011). The parties agreed, in clear and unambiguous language, that they could enter into a subsequent agreement governing funding for online poker play if they wished, but made it equally clear that any modification to the existing contract between them would have to be in writing. The parties discussed such a subsequent agreement, but never executed it. Moreover, whatever the parties may or may not have intended to do vis-à-vis another agreement is wholly irrelevant, because under New Jersey law "It is not the real intent but the intent expressed or apparent in the writing that controls." Friedman v. Tappan Dev. Corp., 22 N.J. 523, 531, 126 A.2d 646, 650 (1956), citing Newark Publishers' Association v. Newark Typographical Union No. 103, 22 N.J. 419, 126 A.2d 348 (1956). Stated another way,

"Parties are not bound by what they think, but rather by what they say." Heim v. Shore, 56 N.J. Super. 62, 72-73, 151 A.2d 556, 561 (App. Div. 1959), citing Savarese v. Pyrene Mfg. Co., 9 N.J. 595, 599, 89 A.2d 237 (1952). Therefore, the Defendant's entire argument that the issue of what the parties intended to do in terms of a second agreement that dealt with funding for online poker play is an unresolved genuine issue of material fact which should have precluded the entry of summary judgment dismissing the Defendant's affirmative defense of illegality is simply incorrect as a matter of law.

Secondly, there is no showing that the Court's conclusion as to the effect of the foregoing language was based upon "a palpably incorrect or irrational basis", or that it "did not consider, or failed to appreciate the significance of probative, competent evidence" as required to grant a motion for reconsideration pursuant to pursuant to R. 4:49-2. Cummings v. Bahr, 295 N.J. Super. at 384, 685 A.2d at 65, citing D'Atria v. D'Atria, 242 N.J.Super. at 401. The Court looked to the language of the agreement, considered the submissions of the parties, heard counsel's arguments as to the meaning and effect of the subject language, and reached the correct result based upon the law of the State of New Jersey and the motion record before it.

2. The Court did not err in determining the issue of severability of potentially unlawful contractual provisions.

The second alleged error identified by the Defendant is that this Court somehow erred in holding that the decision in the case of Naseef v. Cord, Inc., 90 N.J. Super. 135, 143, 216 A.2d 413, 418 (App. Div. 1966) aff'd, 48 N.J. 317, 225 A.2d 343 (1966) does not stand for the proposition that New Jersey law allows for the enforceability of a contract that contains severable provisions that may or may not be illegal, and/or that the question of severability is an issue of fact that could not be decided via summary judgment. This argument fails for three reasons.

First, it is well-settled that the Naseef decision stands for precisely what the Court cited it for:

> It is true that if a contract contains an illegal provision, if such provision is severable the courts will enforce the remainder of the contract after excising the illegal portion.
>
> Naseef v. Cord, Inc., 90 N.J. Super. 135, 143, 216 A.2d 413, 418 (App. Div. 1966) aff'd, 48 N.J. 317, 225 A.2d 343 (1966).

Secondly, there is no issue of severability of illegal provisions because the Court found that, based upon the clear and unambiguous language of the existent written agreement between the parties, the agreement did not govern funding for online poker play. As such, there was no illegal provision in the written agreement between the parties which required severance. The Court merely cited the Naseef decision for the proposition that even if there were illegal provisions in the written agreement, Plaintiff was entitled to trial on this issue to prove that there were distinct and severable damages. Plaintiff still needs to prove the quantum of legally cognizable damages she suffered as a result of the Defendant's admitted breaches of the agreement. The December 4, 2013 Order did not alter the Plaintiff's proofs as to damages, but simply prevents the Defendant from arguing that the subject contract is illegal on its face and thus unenforceable.

Finally, there is no showing that the Court's decision on this point was based upon "a palpably incorrect or irrational basis", or that it "did not consider, or failed to appreciate the significance of probative, competent evidence" as required to grant a motion for reconsideration pursuant to pursuant to R. 4:49-2. Cummings v. Bahr, 295 N.J. Super. at 384, 685 A.2d at 65, citing D'Atria v. D'Atria, 242 N.J.Super. at 401. The Court looked at the clear and unambiguous language of the existent written agreement between the parties, reviewed the relevant case law, considered the submissions of the parties, heard counsel's arguments as to the issue of whether

the agreement sought to enforce obligations relating to activities which the Defendant claims are unlawful, and made its decision. Accordingly, the Defendant's motion should be denied in its entirety as a matter of law.

POINT II

The Defendant's motion should be denied in its entirety because it is untimely pursuant to R. 4:49-2.

The Court sent the December 4, 2013 Order to counsel for both under cover of a December 4, 2013 letter setting forth its findings. Thereafter, I sent another courtesy copy of the December 4, 2013 Order to counsel for the defendant under cover of a letter dated January 8, 2014. Initial service of the December 4, 2013 Order was thus made upon counsel for both parties upon receipt of the December 4, 2013 letter from the Court, which my office received on December 6, 2013.

R. 4:49-2 expressly requires that any motion filed thereunder be filed within twenty (20) days of service of the subject order. Conservatively assuming that the Court's December 4, 2013 letter and Order were received by counsel for the Defendant by December 13, 2013, a full week after receipt by my office, the Defendant would have had until January 2, 2014 to timely file the present motion. Defendant did not file the present motion until on or about January 24, 2014, well after the time period afforded by R. 4:49-2. Accordingly, the Defendant's motion should be denied in its entirety as a matter of law.

POINT III

The Defendant is not entitled to any stay or other injunctive relief.

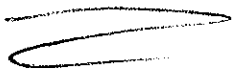
The final point raised in the Defendant's motion is a request for a stay of this case pending resolution of the present motion. Whether this is an attempt to delay the March 10, 2014 trial in this matter is irrelevant. New Jersey law imposes a significant evidentiary burden

upon litigants seeking injunctive relief. See Crowe v. De Gioia, 90 N.J. 126, 132–34, 447 A.2d 173 (1982); Paternoster v. Shuster, 296 N.J. Super. 544, 555-56, 687 A.2d 330, 336 (App. Div. 1997). The Defendant has provided this Court with absolutely no legal or factual basis for awarding any stay or other injunctive relief to the Defendant, for any period of time, and thus the Defendant's request should be denied in its entirety as a matter of law.

Conclusion

For all of the reasons set forth herein, and in the other papers submitted in support of the present motion, plaintiff, Lynne Mitchnick, respectfully requests that this Court deny the defendant's motion for reconsideration in its entirety.

Respectfully Submitted,
STEVEN ROBERT LEHR, P.C.



Eric J. Szoke, Esq.
For the Firm

EJS
cc: David Zeitlin, Esq. (via Federal Express)
Lynne Mitchnick (via email)